No. 98496-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALAN JENKS,
Petitioner.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, JUSTICE POLICY INSTITUTE, COLUMBIA LEGAL SERVICES, THE SENTENCING PROJECT, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

Jessica Levin, WSBA No. 40837
Robert S. Chang, WSBA No. 44083
Melissa R. Lee, WSBA No. 38808

RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 E. Columbia Street
Seattle, WA 98122
(t) 206.398.4167
levinje@seattleu.edu
changro@seattleu.edu
leeme@seattleu.edu

Counsel for Amici Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
JUSTICE POLICY INSTITUTE &
THE SENTENCING PROJECT

Additional counsel listed on next page

Nancy Talner, WSBA No. 11196
Antoinette M. Davis, WSBA No. 29821
Jaime Hawk, WSBA No. 35632

ACLU OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
(t) (206) 624-2184
talner@aclu-wa.org
tdavis@aclu-wa.org
jhawk@aclu-wa.org

Counsel for Amicus Curiae
ACLU OF WASHINGTON

Nick Allen, WSBA No. 42990

COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98101
(t) (206) 287-9660
Nick.allen@columbialegal.org

Counsel for Amicus Curiae
COLUMBIA LEGAL SERVICES

Mark B. Middaugh, WSBA No. 51425

WACDL AMICUS COMMITTEE
710 Second Avenue, Suite 250
Seattle, WA 98104
(t) (206) 674-4700
Mark.middaugh@gmail.com

Counsel for Amicus Curiae
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Cindy Arends Elsberry, WSBA No. 23127
Ali Hohman, WSBA No. 44104

WASHINGTON DEFENDER ASSOCIATION
110 Prefontaine Place South, Suite 610
Seattle, Washington 98104
(t) 206.623.4321
cindy@defensenet.org
ali@defensenet.org

Counsel for Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER CASES

WASHINGTON STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici are set forth in the Motion for Leave to File Brief of Amici Curiae in Support of Petitioner.

INTRODUCTION

When the legislature removed robbery in the second degree (Rob 2) from the list of most serious offenses under the Persistent Offender Accountability Act (POAA), Laws of 2019, ch. 187, § 1,[1] it recognized that treating Rob 2 as a strike no longer served a legitimate penological goal. The fact that life without parole (LWOP) is now the harshest penalty in Washington requires this Court to take a harder look at retroactive application of the new law, especially in light of the extreme race disproportionality of those sentenced to die in prison due to conduct that no longer constitutes a most serious offense. Of the 62 people serving LWOP under the POAA due to Rob 2, "about half are [B]lack, despite African Americans making up only 4% of Washington's population."[2]

---

[1] An explicit retroactivity provision that would have applied to sentences that were final was removed in committee, S.B. 5288, 66th Leg. Reg. Sess. § 2 (2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5288.pdf (original bill), and the bill as passed was silent as to retroactivity. *See* Laws of 2019, ch. 187, § 1.

[2] Tom James, *Lifer Inmates Excluded from Washington '3 strikes' Change*, Seattle Times (May 20, 2019, updated May 22, 2019), https://www.seattletimes.com/seattle-news/its-just-wrong-3-strikes-sentencing-reform-leaves-out-62-washington-state-inmates; *see also* Hearing on ESSB 5288 Before the S. Law & Justice Comm., 66th Leg. Reg. Sess. (2019) (Testimony of Adam Paczkowski at 40:40-41:09), https://www.tvw.org/watch/?clientID=9375922947&eventID=2019021227&startStreamAt=2440&stopStreamAt=2469&autoStartStream=true (as of 2017, 50% of those sentenced under the POAA are Black).

This Court is well aware of Washington's long history of severe race disproportionality in incarceration. On March 2, 2011, in a historic symposium at the Temple of Justice, an ad hoc task force presented its findings, recounting a history in which Washington State, in 1980, had the highest rate in the nation of racially disproportionate representation in its prisons.[3] The Court heard that in 1982, "80% of black imprisonment in Washington for serious crimes could not be accounted for based on arrest rates, though by 2009, this had dropped to 45%."[4] Progress, to be sure, but the task force concluded that observed disproportionalities in incarceration could not be due solely to differential crime commission rates, that facially neutral policies had a disparate impact on people of color, and that "racial and ethnic bias distorts decision-making in the criminal justice system, contributing to disparities."[5] The extreme race disproportionality of those sentenced to die in prison because of at least one Rob 2 strike is, in part, a product of Washington's racial past.

Amici urge the Court to avoid the easy course, which would be to declare that what's past is past. What might appear to be past is actually the lived present and future of people like Mr. Jenks, and for others like

---

[3] Presentation by Race and Criminal Justice System Task Force, Mar. 2, 2011, https://www.tvw.org/watch/?eventID=2011031372.
[4] Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 638 (2012), 87 Wash. L. Rev. 1, 15 (2012), 47 Gonz. L. Rev. 251, 265 (2012).
[5] *Id.*, 35 Seattle L. Rev. at 629, 87 Wash. L. Rev. at 6, 47 Gonz. L. Rev. at 256.

Ms. Cheryl Lidel, a 60-year-old Black woman who will die in prison based on a 2010 Rob 2 conviction for stealing $370 from a Subway,[6] and Mr. Devon Laird, a Black man who will die in prison for snatching a wallet from an elderly man.[7] This case provides a rare opportunity to bring a measure of justice to redress one area of extreme race disproportionality by requiring retroactive application of S.B. 5288 to all those serving LWOP based on Rob 2.

SUMMARY OF ARGUMENT

Rob 2 strike offenses have systematically and disproportionately imprisoned Black people. The only hope those serving LWOP based on Rob 2 have for life outside prison walls is by the grace of the executive through clemency or the prosecutor through RCW 36.27.130. This will lead to uneven justice.

Washington's longstanding common law rule is that the legislature's fundamental reappraisal of the value of punishment is given retroactive effect in all pending cases. *See, e.g., State v. Allen*, 14 Wash. 103, 104-05, 44 P. 121 (1896). However, limiting relief only to pending

---

[6] *State v. Lidel*, No. 69101–5–I, 179 Wn. App. 1041, 2014 WL 861568, at *1 (Mar. 3, 2014); *see also* James, *supra* n.2.

[7] James, *supra* n. 2. The identical article published as Associated Press Wire Service Content in U.S. News & World Report did identify him as Black. Tom James, *Lifer Inmates Excluded from Washington '3 strikes' Change*, U.S. News & World Report (May 21, 2019), https://www.usnews.com/news/us/articles/2019-05-21/3-strikes-sentencing-reform-leaves-out-washington-inmates?context=amp.

cases would leave in place this stark race disproportionality. To remedy this, the Court should extend the common law rule regarding statutory retroactivity to apply to any final POAA sentences with a Rob 2 strike.

Alternatively, the Court must decline to apply the savings statute, RCW 10.01.040, because its application preserves disproportionate sentences that violate article I, section 14. Applying the removal of Rob 2 only to those who commit their third strike on or after July 28, 2019 (S.B. 5288's effective date), produces an arbitrary dividing line that both leaves intact the residue of Washington's racist past and ignores disproportionate sentences under *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

Finally, making S.B. 5288 retroactive regardless of finality of the sentences is in step with this Court's jurisprudence that prioritizes remedying of past wrongs, particularly when they so obviously reflect institutional racism. Doing so reinstates proportionality, elevating justice over legal formalism, in recognition that the power of the judiciary must be wielded to call out and undo racist actions and institutions.

ARGUMENT

I. Life Without Parole Under the POAA Based on a Strike of Second Degree Robbery Is Disproportionately Imposed on Black People and Cannot Be Remedied By the Possibility of Executive or Prosecutorial Grace.

In *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), this Court

invalidated the death penalty statute because of the significant risk that death was disproportionately imposed on Black defendants. It departed from Eighth Amendment jurisprudence and recognized that article I, section 14 protects against a constitutionally cognizable risk of sentences imposed on the basis of race bias. Mr. Jenks's case presents the Court a related race disproportionality problem that it must not ignore. Significant racial disproportionality in imposition of the POAA exists across all types of strike offenses. "Approximately 53% of three strikers are from minority racial groups, while minority groups make up only 25.4% of the state's population." Columbia Legal Services, *Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole* 7 (2010). The greatest disparity exists for the Black community: "almost 40% of three strikes offenders sentenced are African American, while only 3.9% of the state's population is African American." *Id.*

S.B. 5288's sponsor, Senator Jeannie Darneille, testified that 62 of the 289 three-strikers would stand to have their life sentences vacated based on Rob 2 strikes were the law made retroactive. Hearing on ESSB 5288 Before the H. Public Safety Comm., 66th Leg. Reg. Sess. (2019) (Testimony of Sen. Jeannie Darneille at 25:10-25:25), https://www.tvw.org/watch/?clientID=9375922947&eventID=2019031335&startStreamAt=1510&stopStreamAt=1525&autoStartStream=true. Thirty of the 62

would have served less than a 5-year sentence for the crime, were it not a strike offense. *Id.* at 25:56-26:15; *see also* RCW 9.94A.510, .515, .729(3)(e). Instead, they are sentenced to die in prison.

Of the 62 people serving LWOP under the POAA due to Rob 2 strikes, "about half are [B]lack, despite African Americans making up only 4% of Washington's population." James, *supra*; *see also* Testimony of Adam Paczkowski, *supra* n.2 at 40:40-41:09) (as of 2017, 50% of those sentenced under the POAA are Black). The POAA has devastated Black communities.

The only possibility for relief once LWOP has been imposed is through prosecutorial or executive grace. But the possibility of clemency does not alter a life without parole sentence. *Fain*, 94 Wn.2d at 395 (a life sentence must be given its literal meaning, because the "chances for executive grace are not legally enforceable"). And one must have served a significant portion of a sentence before the Clemency and Pardons Board will seriously consider a petition. State of Wash. Office of the Governor, *Washington State Clemency & Pardons Board Policy Manual* 1 (rev. & adopted Mar. 9, 2018) ("In most cases…the Board will not consider a Petition until at least 10 years have passed from the date of conviction."). This is deeply concerning because half of those sentenced to die in prison because of a Rob 2 strike would have served less than a 5-year sentence

for the crime. Testimony of Senator Darneille, *supra* at 25:56-26:15.[8]

While newly enacted S.B. 6164 creates the possibility of resentencing for people whose sentences "no longer advance[] the interests of justice," availability of relief is at the mercy of the county prosecutor who has the sole discretion to determine which cases may merit a second look. RCW 36.27.130(1) ("The prosecutor of a county in which an offender was sentenced…may petition the sentencing court…to resentence the offender if the original sentence no longer advances the interests of justice."). Just like the possibility of clemency does not alter a life without parole sentence, nor does S.B. 6164 remedy disproportionate sentences. S.B. 6164 is an important avenue of relief in some individual cases, particularly in certain counties where prosecutors have decided to prioritize review of three strikes cases involving Rob 2.[9] Even so, piecemeal administration of justice persists, as prosecutorial discretion—which carries with it drastic variance by county[10]—determines who might

[8] The maximum standard range sentence that can be imposed for Rob 2 is 84 months (7 years). RCW 9.94A.510; RCW 9.94A.515 (classifying Rob 2 as level IV seriousness). Due to earned early release credits, even "maxed-out" defendants would serve only four years and eight months of actual incarceration time. RCW 9.94A.729(3)(e) (default earned release time for crimes not specified in statute is one-third of total sentence).

[9] *See, e.g.*, King County Prosecuting Attorney's Office, *New Unit Announcement* (June 5, 2020), https://www.kingcounty.gov/depts/prosecutor/news/sru-announcement.aspx (King County's Sentence Review Unit will prioritize review of three strikes cases based on Rob 2, as Rob 2 is no longer considered a strike).

[10] Many amici are members of a SB 6164 Work Group, which is gathering the S.B. 6164 standards from counties across Washington. Some prosecutors are prioritizing review of POAA sentences involving Rob 2 strikes, *see* King County Prosecuting Attorney's Office, *supra*, whereas other counties, like Spokane and Snohomish, are refusing to even

see justice and who are condemned to die in prison for conduct no longer considered punishable under the POAA. The remote possibility of prosecutorial or executive grace does not excuse the Court from seriously considering the injustice and race-based arbitrariness that characterizes LWOP based on Rob 2.

II. Granting Relief to Those Whose Sentences Are Final Upholds Rather than Eviscerates the Legitimate Goals of Punishment.

Since at least 1896, this Court has recognized that when a statute reflects the legislature's fundamental reappraisal of the value of punishment, that statute is given retroactive effect to all pending cases, including those on direct appeal. *Allen*, 14 Wash. at 105 ("It is familiar law that the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted; *and this rule applies as well after judgment and sentence pending an appeal duly taken therefrom* as before the final determination in the trial court.") (emphasis added). This common law principle is rooted in the long-held penological norm regarding retribution: when conduct is determined to be less culpable and a new penalty deemed adequate, "no purpose is served by imposing the older, harsher one." *State v. Heath*, 85

consider any sentence imposed under a mandatory sentencing scheme such as the POAA. Letter from Larry Haskell, Spokane County Prosecutor (Aug. 25, 2020), on file with counsel; Adam Cornell, Snohomish County Prosecutor, *Discretionary Felony Resentencing Standards and Protocols*, at 2 (undated), on file with counsel.

Wn.2d 196, 198, 532 P.2d 621 (1975) (citing *In re Estrada*, 63 Cal. 2d 740, 745, 408 P.2d 948 (1965); *People v. Oliver* 1 N.Y.2d 152, 151 N.Y.S.2d 367, 134 N.E.2d 197 (1956)). Any different rule would be to "conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." *Estrada*, 63 Cal. 2d at 745; *see also Oliver*, 1 N.Y.2d at 160.

The reliance by the Court of Appeals on RCW 10.01.040, rather than this common law principle, is in direct conflict with this Court's longstanding practice of construing statutes to have retroactive effect on all pending cases, in recognition that RCW 10.01.040 is in derogation of the common law and must be strictly construed. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), *overruled on other grounds by United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), *as recognized in City of Kennewick v. Fountain*, 116 Wn.2d 189, 192–93, 802 P.2d 1371 (1991); *see also State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2019) (changes to discretionary LFO statute prohibiting imposition of costs on indigent defendants applied retroactively to cases pending direct review); *Heath*, 85 Wn.2d at 198 (applying retroactively to all pending cases a statute allowing stay of order declaring a person a habitual traffic offender and revoking license as the legislation effectively reduced the acceptable punishment for a crime); *Zornes*, 78 Wn.2d at 13-14, 26

(amendment to Narcotic Drug Act removing cannabis as a narcotic applied to all pending cases); *Allen*, 14 Wash. at 104-05 (giving retroactive effect to legislature's decriminalizing the sale of improperly labeled imitation dairy products); *cf. State v. Wiley*, 124 Wn.2d 679, 687–88, 880 P.2d 983 (1994) (reaffirming rule that statutes reappraising value of punishment are given retroactive effect).

Instead of simply correcting the erroneous decision of the Court of Appeals and holding that S.B. 5288 applies to all cases not yet final, this Court should hold that the benefits of the legislature's reappraisal of the value of punishment extend to those whose sentences are final. The limit on retroactivity to only pending cases is no longer tolerable, given that the POAA contributes to mass incarceration and has a devastating impact on Black communities and other communities of color. *See* Part I, *supra*.

Extending the common law rule to those whose sentences are final is consistent with the principles that animate retroactive application of new substantive constitutional rules. Though finality is generally the overriding consideration in deciding whether a ruling is retroactive, *In re Pers. Restraint Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (citing *Danforth v. Minnesota*, 552 U.S. 264, 279–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)), any interest in finality must give way where the punishment itself is disproportionate. *Cf. Montgomery v. Louisiana*, 136 S.

Ct. 718, 731, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016). "[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.*

While a court may determine that certain punishments are disproportionate under constitutional norms, legislatures make equally important social judgments about proportionality when they downgrade or otherwise reappraise punishment. "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty…is sufficient to meet the legitimate ends of the criminal law." *Oliver*, 1 N.Y.2d at 160. Leaving disproportionate punishments in place "serves no purpose other than to satisfy a desire for vengeance." *Id.* In other words, when the legislature has determined that certain conduct is less culpable, the retributive purpose behind punishment falls away. *See Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (retribution rationale is that "a criminal sentence must be directly related to the personal culpability of the criminal offender."). Disproportionate sentences should not be tolerated when the legislature refines its thinking on the culpability of certain conduct.

Rather than limiting itself to piecemeal, uneven justice, this Court should answer its own call to look closely at whether its own precedent is

harmful. Washington Supreme Court, Open Letter to the Legal Community (June 4, 2020). The Court could choose to look away and do nothing under cover of the "venerable precedent," *id*., of its common law rule. Instead, this Court must decide whether it is still defensible to limit retroactivity of statutes downgrading punishment to only those sentences that are not yet final, especially when the failure to do so results in such a stark difference to affected individuals. As discussed in Part I, 30 of the 62 whose sentences are final would have served less than a 5-year sentence for the crime if Rob 2 were not a strike offense. Because of the extreme race disproportionality among the 62, extending the common law rule to all those serving LWOP based on Rob 2 would be a small step that would help to address one driver of race disproportionality of people incarcerated in Washington.

III. Application of RCW 10.01.040 Leaves in Place Unconstitutionally Disproportionate Sentences in Violation of Article I, Section 14.

The judiciary is charged with ensuring that the legislature acts within constitutional bounds: "legislative authority is ultimately circumscribed by the constitutional mandate forbidding cruel punishment. [And it is] [o]ur duty to determine whether a legislatively imposed penalty is constitutionally excessive." *Fain*, 94 Wn.2d at 402; *see also Cedar Cty. Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (citing *Moses*

Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll., 81 Wn.2d 551, 555, 503 P.2d 86 (1972) ("Insofar as legislative power is not limited by the constitution it is unrestrained."). This Court is charged with ensuring that application of RCW 10.01.040 does not lead to unconstitutional results. As an alternative to extending the common law rule of statutory retroactivity to final sentences described above, this Court should determine that application of RCW 10.01.040 to S.B. 5288 leaves in place sentences that are vastly disproportionate in violation of the central promise of article I, section 14: that punishment will be proportionate to the crime. *Fain*, 94 Wn.2d at 396; *see also* Supp. Br. of Pet'r at 12 (arguing that imposition of substantially different punishment for the same acts violates article I, section 14).

The continued imposition of LWOP based on Rob 2 violates individual proportionality under *Fain*. Factor 1 requires consideration of the nature of the offense. *Fain*, 94 Wn.2d at 397. The legislature has made the judgment that Rob 2 is not a most serious offense, representing a classic downgrade of punishment. As a Class B felony, Rob 2 was among the least serious offenses included in the POAA. By definition, Rob 2 typically does not involve injury or weapons. *See* RCW 9A.56.190-.210 (defining Robbery as a taking of personal property with use or *threatened* use of force and defining Robbery 1 as being armed with a deadly

weapon). Rob 2 is also in the lowest quartile of seriousness on the SRA sentencing grid, resulting in a standard range sentence as low as three months. *See* RCW 9.94A.515 (classifying Rob 2 as level IV seriousness), and RCW 9.94A.510 (SRA sentencing grid). Rob 2 convictions often result from relatively low-level conduct, such as purse snatchings or muggings, engaged in to support substance use disorders. *See* Jennifer Cox Shapiro, *Life in Prison for Stealing $48: Rethinking Second-Degree Robbery as a Strike Offense in Washington State*, 34 Seattle U. L. Rev. 935, 935-38 (2011) (recounting circumstances underlying Rob 2 convictions of three individuals sentenced to LWOP under the POAA). As such, law enforcement officials and legislators in Washington have long recognized that Rob 2 is an outlier among offenses included as strikes under the POAA. *See* Nina Shapiro, *Prosecutor Admits Possible Injustice in the Three Strikes Law*, Seattle Weekly, Jan. 8, 2008, https://www.seattleweekly.com/news/prosecutor-admits-possible-injustice-in-the-%C2%93three-strikes%C2%94-law/ (reporting on efforts to address LWOP based on Rob 2 convictions by legislators and prosecutors due to the relatively less-serious nature of the offense).

Factor 2 requires consideration of the legislative purpose of the POAA. *Fain*, 94 Wn.2d at 397. The stated purpose is to deter criminals who commit three most serious offenses and to incapacitate them by

segregating them from the rest of society, *State v. Moretti*, 193 Wn.2d 809, 832, 446 P.3d 609 (2019). With Rob 2 no longer a most serious offense, a central purpose of the POAA is, literally, not being served.

Factor 3 requires consideration of the punishment the defendant would have received in other jurisdictions. *Fain*, 94 Wn.2d at 397. Washington has the most punitive form of recidivist punishment in the country—mandatory imposition of life without parole upon the third most serious offense. Many other jurisdictions with recidivist statutes impose something far short of life, or provide an indeterminate scheme allowing for the possibility of release. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 645, Appendix A, Second Column (2012) (punishment imposed under each jurisdiction's recidivist statute).

Finally, factor 4 requires consideration of the "punishment meted out for other offenses in the same jurisdiction." *Fain*, 94 Wn.2d at 397. After *Gregory*, LWOP became the harshest penalty in Washington, and the previous "gradation of sentences that once existed before *Gregory* have now been condensed." *Moretti*, 446 P.3d ¶ 50 (Yu, J., concurring). LWOP is now the same sentence served by serial killers, including at least 93 adults who committed aggravated murder against multiple victims in unimaginably brutal ways. *See* Br. of Appellant at 65-71, *State v. Gregory*,

92 Wn.2d 1 (No. 88086-7) (setting forth the details of these crimes). This case is an opportunity to engage in "a serious reexamination of our mandatory sentencing practices . . . to ensure a just and proportionate sentencing scheme." *Moretti*, 446 P.3d ¶ 50 (Yu, J., concurring). Granting relief to these 62 people would achieve a partial recalibration of our criminal punishment scheme.

Further, there is now inherent arbitrariness within the POAA based simply on the date of commission of the third strike. Consider Persons A and B who each commit a first strike of Rob 2 in 2001 and a second strike of Rob 1 in 2005. If Person A committed a third strike of Rob 1 in 2012, whereas Person B commits a third strike of Rob 1 in 2020, Person A will be sentenced to die in prison. Person B will not. This arbitrariness in outcome based on similar offenses is unconstitutionally cruel.

Finally, the mandatory nature of the POAA prevents consideration of the personal circumstances of the defendant. Because LWOP is now the state's harshest punishment, it should carry with it the guarantee of individualized sentencing that is the hallmark of the death is different jurisprudence. *See Miller v. Alabama*, 567 U.S. 460, 475-78, 132 S. Ct. 2455, 183 L. Ed. 2d. 407 (2012) (citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion)) (because Court had treated juvenile life without parole like the death

penalty, Court's precedent of requiring individualized sentencing became relevant to constitutionality of mandatory LWOP for juvenile homicide offenders). Because Mr. Jenks's and all other three strikers' sentences based on Rob 2 are disproportionate, this Court should decline to apply RCW 10.01.040 and grant them the right to resentencing.

IV. Granting Retroactive Relief Is Consistent with Other Decisions of this Court Reorienting Rules Towards Justice.

Extending relief to those whose sentences are final is consistent with this Court's commitment to addressing racism in our legal system, as it has repeatedly demonstrated in other substantive areas of law.

In *State v. Monday,* 171 Wn.2d 667, 257 P.3d 551 (2011), this Court recognized that rote application of the established test for prosecutorial misconduct would undermine any effort to call out and remedy the prosecutor's "intentional appeals to racial prejudices," *id.* at 680. The traditional test for prosecutorial misconduct requires the defendant to show a substantial likelihood that the misconduct affected the verdict, *see id.* at 679, and this Court recognized that application of this test very well might have required it to affirm a conviction infected by race bias. Rather, the Court applied constitutional harmless error, because an appeal "by a prosecutor to racial bias…fundamentally undermines the principal of equal justice and is so repugnant to the concept of an impartial

trial that its very existence demands that appellate courts set appropriate standards to deter such conduct." *Id.* This unprecedented application of constitutional harmless error recognized not only the danger of explicit racism, but also of more covert forms of racial abuse. *Id.* at 678-79.

This Court has also acted to right its own wrongs of the past, as when it overturned its opinion in *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), where this Court had required Mr. Towessnute to be prosecuted for fishing in the Yakama's usual and accustomed places, directly contravening the treaty with the Yakama Nation. Because the opinion reflected racism against the Yakama Tribe and a fundamental misunderstanding of the nature of treaty rights, this Court repudiated its case, its racist language, and its "mischaracterization of the Yakama people." Order, *State v. Towessnute*, No. 13083-3 (July 10, 2020).

Similarly, this Court recently overruled its opinion in *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 357 P.2d 702 (1960), which invalidated a 1953 statute that made a cemetery's refusal of burial on the basis of race unlawful. *Garfield Cty. Transp. Auth. v. State of Washington*, No. 98320-8, slip op. at 13, fn. 1 (Oct. 15, 2020). The decision was harmful not only because it suggested an overly stringent standard regarding article II, section 19, but "more importantly … because of Justice Mallery's concurrence, which condemns civil rights and

integration." *Id*. This Court pointed to the concurrence as "an example of the unfortunate role we have played in devaluing black lives." *Id.*

Finally, in *In re Pers. Restraint of Domingo-Cornelio*, No. 97205-2 (Sept. 17, 2020), and *In re Pers. Restraint of Ali*, No. 95578-6 (Sept. 17, 2020), this Court ensured that the sea change in juvenile justice jurisprudence brought about by *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), reaches back to remedy unjust sentences of the past. Any child who was treated as an adult at sentencing, no matter how long ago, may now be eligible for a resentencing during which a court must consider the mitigating qualities of youth and has unbridled discretion to disregard any sentencing statute that might contribute to a lengthy, and therefore disproportionate, sentence. *See generally Pers. Restraint of Domingo-Cornelio*, *supra*; *Pers. Restraint of Ali*, *supra*. The practical result is that children charged and sentenced as adults, too many of whom are Black and Brown, will have a real chance to obtain a fairer sentence.

Ali and *Domingo-Cornelio* tacitly recognize that fulfilling our collective commitment to address the overrepresentation of Black and Brown people in our criminal legal system requires not only prospectively remedying unjust sentences, but also remedying final sentences that reflect the injustices of the past. *Accord* Open Letter, *supra* (acknowledging the "racialized policing and the overrepresentation of black Americans in

every stage of our criminal and juvenile justice systems," and charging the legal community to "recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will."). Any reliance interest in final judgments on the part of the State must cede to the more important "interest we all share in the preservation of our constitutionally promised liberties." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408, 206 L. Ed. 2d 583 (2020) (nonunanimous jury rule violates the Sixth Amendment).

CONCLUSION

The concluding paragraph in *Ramos* asks: "On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life?" *Id.* A similar question must be posed here: on what ground can we justify leaving Mr. Jenks, Ms. Lidel, Mr. Laird, and others like them in prison for the rest of their lives?

DATED this 16th day of October 2020.

/s/ Jessica Levin
Jessica Levin, WSBA No. 40837
Robert S. Chang, WSBA No. 44083
Melissa R. Lee, WSBA No. 38808

Counsel for Amici Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
JUSTICE POLICY INSTITUTE
& THE SENTENCING PROJECT

Additional counsel listed on next page

Nancy Talner, WSB No. 11196
Antoinette M. Davis, WSB No. 29821
Jaime Hawk WSBA No. 35632

Counsel for Amicus Curiae
ACLU OF WASHINGTON

Nick Allen, WSBA No. 42990

Counsel for Amicus Curiae
COLUMBIA LEGAL SERVICES

Mark B. Middaugh, WSBA No. 51425

Counsel for Amicus Curiae
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Cindy Arends Elsberry, WSBA No. 23127
Ali Hohman, WSBA No. 44104

Counsel for Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on October 16, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 16th day of October, 2020.

/s/ Jessica Levin
Jessica Levin
Attorney for Amici Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
JUSTICE POLICY INSTITUTE &
THE SENTENCING PROJECT

KOREMATSU CENTER FOR LAW AND EQUALITY

October 16, 2020 - 3:11 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98496-4
Appellate Court Case Title:	State of Washington v. Alan Dale Jenks
Superior Court Case Number:	14-1-04486-1

The following documents have been uploaded:

- 984964_Briefs_20201016150839SC557243_1945.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Jenks Amicus Brief final.pdf
- 984964_Motion_20201016150839SC557243_6122.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Jenks Motion for Leave to File final.pdf

A copy of the uploaded files will be sent to:

- afettig@sentencingproject.org
- ali@defensenet.org
- bpearce@spokanecounty.org
- changro@seattleu.edu
- cindy@defensenet.org
- greg@washapp.org
- jan@washapp.org
- jhawk@aclu-wa.org
- leeme@seattleu.edu
- levinje@seattleu.edu
- lsteinmetz@spokanecounty.org
- mark.middaugh@gmail.com
- mark.middaugh@kingcounty.gov
- pleadings@aclu-wa.org
- rking@justicepolicy.org
- scpaappeals@spokanecounty.org
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Jessica Levin - Email: levinje@seattleu.edu
Address:
901 12TH AVE
KOREMATSU CENTER FOR LAW & EQUALITY
SEATTLE, WA, 98122-4411

Phone: 206-398-4167

Note: The Filing Id is 20201016150839SC557243